STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of EMMANUEL MALACHI NEWKIRK, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

GREGORY ELDRIDGE,

Respondent-Appellant,

and

DESIREE G. NEWKIRK and MARCUS ROBERSON,

Respondents.

UNPUBLISHED
October 20, 2009

No. 291069
Wayne Circuit Court
Family Division
LC No. 06-461144

Before: Fort Hood, P.J., and Sawyer and Donofrio, JJ.

PER CURIAM.

Respondent-appellant appeals as of right from the order of the family division of the circuit court terminating his parental rights his to son under MCL 712A.19b(3)(g) (failure to provide proper care and custody), (h) (parent is imprisoned), and (j) (child will likely be harmed if returned).[1] We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. Facts

[1] The court also terminated the parental rights of the child's mother, but she has not elected to appeal.

Proceedings in this case began in 2006. According to the petition, the respondent mother was living in North Carolina with her four children, including the one involved in this appeal, but abandoned the younger three to the care of the eldest, then 13 years old, and announced her intention to move to Michigan. Relatives brought the children to Michigan, but the mother's whereabouts could not be determined at first. The petition identified respondent as the subject child's putative father, and added that he:

> has provided for the child emotionally, financially and physically. Family members report that the child has lived with his father in Arkansas 50% of the time or more since the child's birth. [Respondent] lives out of state and has failed to establish paternity therefore the child cannot be placed in his care at this time.

Respondent participated in some of the early proceedings in this matter, including by way of establishing his paternity of the subject child. He appeared by telephone at the dispositional hearing, at which the case worker testified to intending to arrange with Arkansas officials to complete an assessment of respondent's home, and added that respondent had repeatedly asked to "get this home study done as soon as possible." The assessment never took place, however. Petitioner asserts that this is because respondent "disappeared," failing to provide the foster care worker with contact information.

At a dispositional review hearing, the trial court stated, "I believe that the father's attorney at a prior hearing was thanked and excused as that parent was not involved in the court proceedings, or in a treatment plan." Respondent appeared neither personally nor through counsel at the several hearings that followed. Respondent reappeared, with counsel, in order to testify by telephone from an Arkansas penal facility.

Respondent admitted that he had been convicted and was serving a sentence of 15 years. Petitioner presented documentation indicating that respondent's crimes were aggravated robbery, kidnapping, and theft of property. Respondent reported that his earliest out date was 2017, but expressed hopes that a successful appeal would shorten that period.

Respondent recounted, "I was just waiting on the home study, and something got screwed up with the paper work in 2007 with the home study. And I got sentenced to my time in April of 2007." Asked when he was arrested in connection with his current incarceration, respondent stated that it was on July 14, 2006, which happened to be the child's fourth birthday. Asked to describe his pre-arrest relationship with the child, respondent answered that the boy spent probably more time with him than with his mother, specifying "I use[d] to keep him for months at a time, 3, 4, 5, months at a time. I was getting him twice a year 3, 4, months at a time," and stated that he last had the child in his custody in July 2006, and had last seen him in March 2007.

Respondent testified that he and the boy shared a close bond, and that he had remained friendly with the mother after their romance had ended. Respondent continued that he wanted to obtain custody of the child as soon as he heard about the petition, but that he could not proceed until he established paternity.

The trial court determined that termination of respondent's parental rights was proper according to three statutory criteria, and further opined that it was in the child's best interest.

On appeal, respondent argues he was denied his procedural rights to notice and the assistance of counsel, that the trial court clearly erred in concluding both that the statutory criteria for termination were satisfied,[2] and that termination was in the child's best interest.

II. Procedural Issues

Nowhere in the proceedings below did respondent complain about any deprivation of notice, or lack of legal representation, concerning any part of the proceedings, thus leaving this issue unpreserved. Appellate review is limited to ascertaining whether there was plain error affecting substantial rights. See *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000), citing MRE 103(d); *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Parents have a fundamental liberty interest in the "companionship, care, custody, and management of their children." *In re Brock*, 442 Mich 101, 109; 499 NW2d 752 (1993). A governmental deprivation of a citizen's rights minimally requires that the citizen receive notice and an opportunity to be heard on the subject. See *Mudge v Macomb Co*, 458 Mich 87, 101; 580 NW2d 845 (1998). See also MCL 712A.12; MCR 3.921(B)(2)(c)

On appeal, respondent suggests that it is something of a mystery why he dropped out of participation in the proceedings for a large part of them, stating, "It is unclear whether [respondent's] appointed counsel just failed to show up at the September 19, 2007 review and any hearings thereafter or what happened." Respondent complains that the trial court's statement that his "attorney at a prior hearing was thanked and excused as that parent was not involved in the court proceedings, or in a treatment plan," is not supported elsewhere in the record, but stops short of asserting that the trial court wholly fabricated that account. The foster care specialist assigned to the case had earlier testified to her intent to work with respondent, and testified that the child's "mother told me today that the father, [respondent], she spoke to last week and he has moved and has a new telephone number," adding, "I'm hoping that she'll be able to provide that to me." She further testified that she would also try to contact respondent through Internet searching. These indications suggest that it was not any failure on the part of the authorities that was behind respondent's lack of participation.

Moreover, respondent received notice of the petition in the first instance, came forward to protect his interest in his child, and was credited in the petition with having "provided for the child emotionally, financially and physically." At the December 2006 dispositional hearing, the caseworker reported that respondent had "numerous times" asked to "get this home study done as soon as possible." These indications that respondent showed great concern, and took considerable initiative, early in the proceedings militate against concluding that respondent

[2] Respondent variously states that his parental rights were terminated on the grounds specified in 712A.19b(3)(c)(*i*) (conditions of adjudication continue to exist) and (c)(*ii*) (failure to rectify other conditions that warrant the court's jurisdiction), but the trial court's statements from the bench included no mention of that subsection.

continued this level of interest and initiative but was frustrated in the matter by unspecified breaches of duty on the part of his attorney or child protective authorities.

We also regard respondent's silence concerning such matters at the November 7, 2008, termination hearing as further indication that respondent did not spend those months in a state of eagerness to participate that was frustrated for lack of notice and arbitrary denial of legal counsel. For these reasons, we reject this claim of error.

III. Substantive Issues

In order to terminate parental rights, the trial court must find that at least one of the statutory grounds for termination has been met by clear and convincing evidence. *In re McIntyre*, 192 Mich App 47, 50; 480 NW2d 293 (1991). An appellate court "review[s] for clear error both the court's decision that a ground for termination has been proven by clear and convincing evidence and, where appropriate, the court's decision regarding the child's best interest." *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). See also MCR 3.977(J). A finding is clearly erroneous if the reviewing court is left with a definite and firm conviction that a mistake has been made. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). A reviewing court must defer to the special ability of the trial court to judge the credibility of witnesses. *Id.*

MCL 712A.19b(3) provides, in pertinent part, as follows:

> (3) The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:
>
> * * *
>
> (g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.
>
> (h) The parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years, and the parent has not provided for the child's proper care and custody, and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.
>
> * * *
>
> (j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

Respondent's argument concerning § 19b(3)(h) consists of the following:

> This section requires the parent to be imprisoned for a period exceeding 2 years **and** that the parent has not provided for the child's custody and that there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time. This child had been with his father before he went into care, over 50% of the time. It is unfortunate that [respondent] lived out of state at the time the petition was filed or the child would have been placed with him. [Bold in the original.]

Respondent thus does not dispute that he will be incarcerated for more than two years beyond the date of the termination hearing, and abandons the argument raised in the lower court that an appeal might reduce his sentence.[3] Although there is evidence that the child resided with respondent for significant periods at one time, he was not doing so at the time his mother abandoned him, he did not reside with respondent during any part of the child protective proceedings, and, in light of respondent's imprisonment continuing until at least 2017, there is no reasonable expectation that respondent will be able to care for the child in reasonable time. Although respondent emphasizes that he did once live with, and provide for, the child for significant periods, respondent does not argue that a parent who has ever cared for a child, however intermittently or remotely in time, thus stands forever immunized from application of § 19b(3)(h). For these reasons, the trial court did not clearly err in concluding that this statutory criterion for termination was satisfied.

Nor did it err in concluding that § 19b(3)(g) was satisfied. Respondent was not providing proper care or custody when the child's mother abandoned the child, never did so thereafter, has no present ability to do so because he is in prison, and will not be able to do so in reasonable time given that he will remain imprisoned until at least 2017. Respondent protests that he was not offered services, and that no assessment of his home was ever conducted. However, as discussed above, his attempt to blame the Michigan authorities for the long interruption of his relationship with them is not persuasive.

We question whether § 19b(3)(j) is applicable in this situation, given that it concerns the consequences of *returning* the child to the parent. The child was not in respondent's custody when child protective proceedings began, or during any part of them, and the situation from before then whereby respondent intermittently provided the child with physical, financial, and emotional support is no longer an available environment to which to return the child. We need not decide whether this factor is applicable however, because termination requires only a single statutory basis, and we have affirmed the trial court's conclusions with regard to two.

Once a court determines, upon clear and convincing evidence, the existence of one or more statutory grounds for termination, and "that termination of parental rights is in the child's

---

[3] Before respondent's brief on appeal was filed, his appeal was decided against him. *Eldridge v Arkansas*, unpublished opinion per curiam of the Arkansas Court of Appeals, issued April 30, 2008 (Docket No. CACR 07-1233); 2008 WL 1891399.

best interests, the court shall order termination of parental rights" . . .. MCL 712A.19b(5); see also MCR 3.977(G)(3).

Again, the court stated, "it is in the best interest of the child to have [respondent's] rights terminated so that the child may be made available for adoption." The court did not clearly err. Respondent's incarceration, which his unsuccessful appeal now guarantees will last at least until 2017, militates against disturbing the finding that the child's best interest is served by severing respondent's parental rights. Likewise the criminal rampage that brought that state of incarceration about, as reported within the opinion deciding that appeal:

> At approximately 11:00 p.m. on August 14, 2006, a masked assailant [respondent] entered a Dumas Pizza Hut brandishing a gun and yelling orders at customers and employees. He demanded that the door be locked and ordered everyone into the walk-in cooler. The assailant threatened various employees with the gun and forced them to complete activities, including locking the door and emptying the money from the register into bags. The assailant further assaulted certain employees, pushing one pregnant employee . . . to the ground and cursing at her and placing another employee . . . in handcuffs. [*Eldridge v Arkansas*, unpublished opinion per curiam of the Arkansas Court of Appeals, issued April 30, 2008 (Docket No. CACR 07-1233); 2008 WL 1891399 at *1.]

For these reasons, we affirm the trial court's conclusions that statutory criteria for termination were proved by clear and convincing evidence, and that termination comported with the child's best interest.

Affirmed.

/s/ Karen M. Fort Hood
/s/ David H. Sawyer
/s/ Pat M. Donofrio